

The Hung Jury: *The American Jury's* Insights and Contemporary Understanding*

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Most juries hear evidence, deliberate together, and deliver a verdict. But on occasion, jurors cannot agree upon a verdict, resulting in a hung jury. Why do juries hang? What circumstances and conditions give rise to this apparent failure of the jury system?

Writing three decades ago, the social scientist and jury scholar Hans Zeisel identified the hung jury as a treasured yet paradoxical phenomenon.¹ It constitutes a treasured symbol of the law's deep respect for the perspective

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¹ Hans Zeisel, . . . *And Then There Were None: The Diminution of the Federal Jury*, 38 U. Chi. L. Rev. 710 (1971). The exact origin of the term "hung jury" to refer to a jury that is unable to arrive at a verdict is unclear to us. Apparently of American origin, the usage of the word hung to refer to juries that cannot agree seems to match most closely to the meaning of the word hung as caught, stuck, or delayed. The Oxford English Dictionary (2d ed.) reports the first printed reference to a hung jury in Edwin Bryant's *What I Saw in California* 291 (1848-1849): "The jury . . . were what is called 'hung'; they could not agree, and the matters in issue, therefore, remained exactly where they were."

Mike Widener, Head of Special Collections at Tarlton Law Library, University of Texas at Austin, reports that the earliest citation of hung jury he located in a law dictionary (either English or American) is in William C. Anderson's *A DICTIONARY OF LAW* (1889): "Hung. Is sometimes applied to a jury which fails to agree upon a verdict."

Charles Hallinan of the University of Dayton School of Law reports that a search of the West and Lexis case databases for "hung jury" and its variants identifies the first usage in an 1821 case from Kentucky, *Evans v. McKinsey*, 16 Ky. 262. In an action for the recovery of two slaves, the court opinion notes that: "one of the jurors, before the trial, had been heard to say, that he had heard the evidence as to

of the minority, yet it remains a paradox because it can only exist if it is relatively infrequent. Large numbers of hung juries would be too disruptive for the court system. Zeisel and his lawyer collaborator Harry Kalven, Jr. were the first to examine systematically the intriguing phenomenon of the hung jury in their groundbreaking work, *The American Jury*.² In this article, we review their conclusions about hung juries, and summarize contemporary work that builds on and further illuminates why juries hang.

Kalven and Zeisel's *The American Jury*

The classic study of the American jury, conducted by Kalven and Zeisel in the mid-1950s, focused, albeit briefly, on the phenomenon of hung juries in criminal trials. Judges in their study completed questionnaires on a total of 3,576 of their jury trials, providing case details, the jury's verdict, and the verdict the judge would have reached had he decided the case.³ The famous four-fold table, comparing actual jury verdicts with hypothetical judge verdicts, treated hung juries in a novel and some might argue questionable way.⁴ In a six-fold table, Kalven and Zeisel showed the percentage of jury trials in which judges would have acquitted or convicted, and the jury actually acquitted, convicted, and hung.⁵ The table showed that the jury was unable to reach a verdict in 5.5% of the cases in the sample, or about one in twenty jury trials. In 1.1% of the cases overall, the jury hung but the judge would have acquitted; while in 4.4% of the cases overall, the jury hung but the judge would have convicted.⁶

Because the inclusion of the hung juries made the table "somewhat awkward to handle," Kalven and Zeisel redistributed the hung juries, half as convictions and half as acquittals, to produce the familiar four-fold table of

the right of the parties to the slaves in contest, and had made up his opinion, who ought to recover, and that he wished to be upon the jury, and if he should be, he would hang the jury forever, or find for M'Kinsey. It was on making this discovery, that M'Kinsey applied for and obtained the new trial." Professor Hallinan observes that 11 of the 12 earliest citations in court opinions to the term hung jury occur in southern cases, suggesting that the term emerged locally in southern states including Kentucky. Interestingly, Professor Hallinan points out that Edwin Bryant, credited with using the term early on by the Oxford English Dictionary, lived in Kentucky until the mid-1840s.

We thank Mike Widener, Charles Hallinan, and Evan Bend of the Appleton Public Library for their assistance in locating early uses of the term.

² Harry Kalven, Jr. & Hands Zeisel, *The American Jury* (1966).

³ *Id.* at 33.

⁴ *Id.* at 58, Table 12.

⁵ *Id.* at 56, Table 11.

⁶ *Id.* See also Harry Kalven, Jr., *The Dignity of the Civil Jury*, 50 Va. L. Rev. 1055 (1964) (reporting the judge-jury agreement rates in civil jury trials). A footnote in the article implies that hung juries also occurred among the civil trials, but the actual number is not provided. *Id.* at 1064 n.20.

THE HUNG JURY

judge and jury acquittals and convictions.⁷ The rationale behind the 50-50 split was not derived from court statistics showing the consequences of hung juries, but rather based on “an estimate we were given by an experienced prosecutor.”⁸ That prosecutor asserted that roughly half the hung jury cases had the same practical consequences for the defendant as an acquittal, either because a subsequent trial ended in an acquittal, or because the prosecution was dropped.⁹ In assessing rates of judge-jury disagreement, Kalven and Zeisel counted each hung jury as one half of a disagreement, since “only some of the jurors, not all of them, were in disagreement with the judge”¹⁰

Whatever the merits of their rationale, which seems debatable today, the effect was to place an invisibility cloak over the phenomenon of hung juries. Once integrated into the four-fold table, the fact that a jury could not agree on a verdict is rarely mentioned in *The American Jury*, other than a short chapter on the topic. In that chapter Kalven and Zeisel took a closer look at the hung jury cases in their sample, assessing the reasons judges gave for the jury’s inability to reach a verdict, including case and defendant characteristics that the jury may have found important.

To gain insight into whether there were distinctive reasons that led juries to hang, the authors compared the reasons that judges provided for their disagreements with jury verdicts to the reasons in hung juries. Overall, Kalven and Zeisel concluded that as a general matter the same reasons caused juries to disagree with the judge and to disagree with one another. Evidence factors were the most significant, accounting for 52% of the jury’s disagreements with the judge and 71% of the hung juries. Jurors’ sentiments about the law explained 30% of the disagreements but only 17% of the hung juries. Sentiments about the defendant, disparity of counsel, and facts only the judge knew each accounted for only a small portion of judge-jury disagreements and hung juries, with similar numbers in each of these categories.¹¹ Thus evidence problems seemed to be more important, and sentiments about the law seemed to be less significant, in hung jury cases than in cases in which jury verdicts diverged from judicial opinions.

Kalven and Zeisel also identified some evidentiary characteristics of cases likely to result in hung juries. One issue was whether the complexity of the case created difficulty for juries and made it hard to reach a verdict. Although Kalven and Zeisel did not ask a question about evidentiary complexity in their initial round of questionnaires sent to judges, the second round included an item asking judges whether the evidence in the case was easy to comprehend, somewhat difficult, or very difficult to comprehend.¹² Easy cases were defined as those cases with relatively few difficult eviden-

⁷ Kalven & Zeisel, *supra* note 2, at 57.

⁸ *Id.* at 58, n.4.

⁹ *Id.* at 57-58, n.4.

¹⁰ *Id.* at 455.

¹¹ *Id.* at 456.

¹² *Id.* at 532.

tiary issues to be decided, according to the judge's assessment of the case. In addition, in the second sample, judges were asked, "From the factual evidence in the case, was the defendant's guilt or innocence very clear, [or] a close question whether or not he was guilty beyond a reasonable doubt?"¹³ Kalven and Zeisel used this question to rate the closeness or ambiguity of the evidence in the case.

The likelihood of a hung jury was then assessed for cases where the evidence was clear or close, and for cases with easy and difficult evidence. In 10% of the cases in which the judge rated the trial evidence as fairly close—that is, the defendant's guilt was a close question—the jury hung, regardless of the complexity of the trials.¹⁴ In comparison, cases in which the evidence strongly favored one side resulted in hung juries in 2% of the easy cases and in 5% of the complex cases.¹⁵ Deliberation times were also longer in hung juries, not surprisingly.¹⁶

Final votes of the jury were reported in a small sample of 48 hung jury cases.¹⁷ In 63% of cases in which the jury deadlocked, the majority of jurors voted in favor of conviction, compared to 24% of cases in which the majority of jurors voted in favor of acquittal. Jurors in the remaining cases (13%) were evenly split between conviction and acquittal.¹⁸ The conviction-acquittal ratio closely mirrored the disposition of jury verdicts for cases in which the jury reached a consensus (two-thirds for conviction and one-third for acquittal), suggesting to Kalven and Zeisel that the propensity of juries to hang is largely symmetrical.¹⁹

Interpreting these modest data further, Kalven and Zeisel discovered that the proportion of juries that hung with only one or two holdout jurors favoring either conviction or acquittal constituted 42% of all hung juries.²⁰ They projected that states with majority verdict rules that accepted a 10-2 or 11-1 verdict, therefore, would have reduced hung jury rates by that amount. And indeed, two states with majority verdict rules, Oregon and Louisiana, which together contributed 64 trials to the 3,576 trials, had about half the hung jury rate of the other states.²¹ However, it's important to note that empirical research indicates that there are substantial deliberation process differences in unanimity and majority verdict rule juries.²² In particular, majority rule jury deliberations are less thorough in their assessment of the

¹³ Id.

¹⁴ Id. at 457.

¹⁵ Id.

¹⁶ Id. at 457-60.

¹⁷ Id. at 460. Kalven and Zeisel obtained these data in Sample 2 only.

¹⁸ Id.

¹⁹ Id. at 460-61.

²⁰ Id. at 461-62.

²¹ Id. at 461, Table 126.

²² For summaries of the research, see Valerie P. Hans, *The Power of Twelve: The Impact of Jury Size and Unanimity on Civil Jury Decision Making*, 4 Del. L. Rev. 1 (2001). See also Valerie P. Hans & Neil Vidmar, *Judging the Jury* (1986)[hereinaf-

evidence. Hence, one cannot equate a majority rule jury deliberation and verdict with a unanimity rule deliberation and verdict minus the holdouts.

Some intriguing information reported by Kalven and Zeisel involved data they collected as part of another line of research in the Chicago Jury Project. They interviewed jurors in two urban courts after their trials, and asked them about the first-ballot votes and final decisions in their cases. Kalven and Zeisel then reconstructed the first-ballot votes of each jury, plotting the different vote constellations against whether juries were able or unable to reach a verdict.

The numbers are very small but interesting for what they suggest. When the first ballot vote was heavily skewed toward one verdict or another, the jury was unlikely to hang.²³ Most hung juries occurred in cases in which jurors had substantial initial splits of opinion. Even though the final vote of hung juries might show only one or two dissidents, Kalven and Zeisel concluded that “for one or two jurors to hold out to the end, it would appear necessary that they had companionship at the beginning of the deliberations.”²⁴ Kalven and Zeisel inferred from the pattern of first-ballot splits that substantial disagreement over the evidence, rather than solitary eccentric holdouts, were responsible for most hung juries. From the same data, they also reached the controversial conclusion that deliberation was not very important to jury decision making, since final verdicts could be predicted from the first-ballot vote constellations.

In sum, Kalven and Zeisel’s focused but limited attention to the hung jury produced the following wisdom: that juries hang infrequently, in about one trial in twenty; that evidence and sentiments about law are important factors; and that hung juries are characterized by substantial disagreement on the first ballot vote.

Impact of Kalven and Zeisel’s Research on Hung Juries

Kalven and Zeisel’s work on criminal juries has been cited with great regularity over the years,²⁵ including, notwithstanding its brevity, that concerning hung juries.²⁶ This latter reliance has been most prominent in cases considering whether jury unanimity should be required. Writing for

ter Judging the Jury]; Reid Hastie, Steven D. Penrod & Nancy Pennington, *Inside the Jury* (1983).

²³ Kalven & Zeisel, *supra* note 2, at 462.

²⁴ *Id.* at 463.

²⁵ Writing at the twenty-fifth anniversary of the publication of *The American Jury*, Hans and Vidmar reported that as of 1990 the book had been cited over 900 times in social science journals and law reviews and 138 times by appellate courts, including the United States Supreme Court. Valerie P. Hans & Neil Vidmar, *The American Jury at Twenty-Five Years*, 16 *Law & Soc. Inquiry* 323, 345 (1991)[hereinafter Hans & Vidmar, *Retrospective*].

²⁶ *Id.* at 346.

the majority in *Apodaca v. Oregon*,²⁷ which upheld the constitutionality of majority verdicts in state felony trials, Justice White opined that the Court perceived no difference in the ability of unanimity and majority rule juries to achieve the important functions of the jury trial. As evidence supporting the idea of functional equivalence, he cited *The American Jury*: “The most complete statistical study of jury behavior has come to the conclusion that when juries are required to be unanimous, ‘the probability that an acquittal minority will hang the jury is about as great as that a guilty minority will hang it.’”²⁸

Concurring in the companion case of *Johnson v. Louisiana*,²⁹ Justice Powell also drew on Kalven and Zeisel in support of his conclusion that a less than unanimous decision rule did not violate due process:

The available empirical research indicates that the jury-trial protection is not substantially affected by less-than-unanimous verdict requirements. H. Kalven and H. Zeisel, in their frequently cited study of American juries . . . note that where unanimity is demanded 5.6% of the cases result in hung juries. Where unanimity is not required, available statistics indicate that juries will still be hung in over 3% of the cases. Thus, it may be estimated roughly that Oregon’s practice may result in verdicts in some 2.5% more of the cases—cases in which no verdict would be returned if unanimity were demanded. Given the large number of causes to which this percentage disparity might be attributed, and given the possibility of conviction on retrial, it is impossible to conclude that this percentage represents convictions obtained under standards offensive to due process.”³⁰

In a vigorous dissent in the same case, Justice Douglas countered with his own citations to Kalven and Zeisel:

The diminution of verdict reliability flows from the fact that nonunanimous juries need not debate and deliberate as fully as must unanimous juries. As soon as the requisite majority is attained, further consideration is not required either by Oregon or by Louisiana even though the dissident jurors might, if given the chance, be able to convince the majority. Such persuasion does in fact occasionally occur in States where the unanimous requirement applies: “In roughly one case in ten, the minority eventually succeeds in reversing an initial majority, and these may be cases of special importance.”³¹

Douglas also drew on Kalven and Zeisel’s hung jury data to show that upholding majority decision rules favor the government over the defendants:

²⁷ *Apodaca v. Oregon*, 406 U.S. 404, 92 S. Ct. 1628, 32 L. Ed. 2d 184 (1972).

²⁸ *Id.* at 411 (citing H. Kalven & H. Zeisel, *The American Jury* 461 (1966)). The empirical truth of Justice White’s assertion about the equal likelihood of a minority for acquittal and conviction hanging the jury has been tested. See Robert J. MacCoun & Norbert L. Kerr, *Asymmetric Influence in Mock Jury Deliberation: Jurors’ Bias for Leniency*, 54 J. Pers. & Soc. Psychol. 21 (1988) (showing that mock juries show greater willingness to accede to a minority arguing for acquittal than for conviction).

²⁹ *Johnson v. Louisiana*, 406 U.S. 356, 92 S. Ct. 1620, 32 L. Ed. 2d 152 (1972).

³⁰ *Id.* at 374-75 n.12 (Powell, J., concurring) (citing *The American Jury* 461 (Phoenix ed. 1971)).

³¹ *Id.* at 388-89 (Douglas, J., dissenting) (citing *The American Jury* 490 (1966)).

THE HUNG JURY

The new rule also has an impact on cases in which a unanimous jury would have neither voted to acquit nor to convict, but would have deadlocked. In unanimous-jury States, this occurs about 5.6% of the time. Of these deadlocked juries, Kalven and Zeisel say that 56% contain either one, two, or three dissenters. In these latter cases, the majorities favor the prosecution 44% (of the 56%) but the defendant only 12% (of the 56%) Thus, by eliminating these deadlocks, Louisiana wins 44 cases for every 12 that it loses, obtaining in this band of outcomes a substantially more favorable conviction ratio (3.67 to 1) than the unanimous-jury ratio of slightly less than two guilty verdicts for every acquittal. By eliminating the one-and-two-dissenting-juror cases, Oregon does even better, gaining 4.25 convictions for every acquittal. While the statutes on their face deceptively appear to be neutral, the use of the nonunanimous jury stacks the truth-determining process against the accused.³²

The warring citations point to the prescience of Kalven and Zeisel who concluded *The American Jury* with the prediction that “in the detailed inventory we have provided of its behavior, assuredly both friends and critics will find new ammunition for their case.”³³ Certainly, Zeisel, a strong advocate of jury unanimity, saw the research as pointing to the desirability of retaining the requirement that all jurors agree.³⁴

The hung jury material was also regularly cited by scholars in legal and social science publications as well as books on the jury.³⁵ In particular, books and articles reporting mock jury research on jury size and unanimity cited the hung jury findings, the data showing a relationship between initial ballots and final votes, and reported attempts to replicate them in laboratory settings.³⁶ Despite the perilously small numbers of hung juries in some comparisons, Kalven and Zeisel’s early data on hung juries were often accepted at face value.

Close to half a century has passed, and there is good reason to question whether these data about the hung jury still apply to the contemporary jury system. Juries are much more heterogeneous now than in the 1950’s, and it is possible that this greater diversity on juries translates into more hung juries. Societal changes have occurred, including more concern about crime and greater appreciation for civil rights, both of which may affect the willingness of jurors to acquiesce in a unanimous verdict. Social science research, too, has expanded, and we know much more now about how jurors perceive and integrate evidence and decide as a group.³⁷

³² Id. at 390-91 (Douglas, J., dissenting) (citing *The American Jury* 461, 488 (1966)).

³³ Kalven & Zeisel, *supra* note 2, at 498.

³⁴ See Zeisel, *supra* note 1, at 721-24. “. . . *And Then There Were None: The Diminution of the Federal Jury*,” 38 U. Chi. L. Rev. 710, 721-24 (1971).

³⁵ Hans & Vidmar, *Retrospective*, *supra* note 25, at 336-45.

³⁶ See, e.g., Hastie et al., *supra* note 22; Michael J. Saks, *The Smaller the Jury, the Greater the Unpredictability*, 79 *Judicature* 263 (1996).

³⁷ Hastie et al., *supra* note 22, at 15-36 (focusing on the psychology of juror and jury decision making); and at 99-120 (focusing on the dynamics of jury delibera-

Subsequent Research on the Hung Jury

In the three decades following Kalven and Zeisel's initial work, only modest examination of the phenomenon of hung juries took place, which is all the more remarkable because those decades were characterized by considerable public attention to juries, including the problem of hung juries, and a dramatic increase in jury research.³⁸ Two reasons suggest themselves. First, hung juries are rare events in most jurisdictions, making them difficult to study systematically. Indeed, some jurisdictions use a hung jury as a temporary holding device in their case data files, a notation that is erased after the case is finally resolved either by a retrial, plea, or dismissal of charges.³⁹

Second, they are not easily studied using the method of mock jury simulation, a frequently used research approach. Mock jury studies are often conducted under time constraints on jury deliberations (if mock jurors are allowed to deliberate at all), and thus don't provide mock jurors with a full opportunity to arrive at a consensus if serious disagreements occur. The real life consequences of actual jury verdicts are also missing in a mock jury setting. A person who might go along with others on a mock jury could hang an actual jury when conforming would produce what the individual sees as an erroneous conviction or acquittal. Finally, controlled laboratory experiments with mock jurors shed little light on the contextual factors that may affect the incidence of hung juries, such as the rate of plea bargaining or prosecution and defense litigation resources. As a result, although mock jury research can provide some valuable insights, it is limited in what it can explain about the actual frequency of hung juries or their underlying causes.

To analyze the factors that lead to hung juries and to provide information for policy debates, the National Center for State Courts (NCSC), with funding by the National Institute of Justice, undertook a multi-phased project on the hung jury.⁴⁰ The first phase was a broad-based survey of hung jury rates, using felony case data from all federal courts and 30 state courts in 75 of the most populous counties.⁴¹ The second phase was an in-depth study of data collected from jurors, judges, and attorneys in 382 non-capital felony

tions); Dennis J. Devine et al., *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 *Psych., Pub. Pol'y & L.* 622 (2001).

³⁸ Hans & Vidmar, *Retrospective*, supra note 25, at 336-38.

³⁹ Paula L. Hannaford, Valerie P. Hans & G. Thomas Munsterman, *How Much Justice Hangs in the Balance? A New Look at Hung Jury Rates*, 83 *Judicature* 59 (1999).

⁴⁰ Paula L. Hannaford-Agor, Valerie P. Hans, Nicole L. Mott, & G. Thomas Munsterman, *Are Hung Juries a Problem?* (Final Report, National Center for State Court, to National Institute of Justice, September 30, 2002) [hereinafter Hannaford-Agor et al., *Are Hung Juries a Problem?*].

⁴¹ Data on federal trial dispositions were collected for the period 1980 through 1997. Similar data from state courts were collected for the period 1996 through 1998. *Id.* at 19.

jury trials in four jurisdictions.⁴² In this article, we draw on selected findings from this project, but also on other jury research, to provide a contemporary empirical picture of the phenomenon of hung juries.

Hung Jury Rates

A major factor driving the NCSC research was the expressed concern that hung juries were increasing and in some jurisdictions had reached unacceptably high levels. During the 1990s, for example, several communities, especially in California, were reporting that 10% or more of their criminal jury trials were resulting in jury deadlock.⁴³ Around the same time, a handful of high profile trials resulted in hung juries. For example, Lyle and Eric Menendez stood trial on charges that they murdered their parents, raising a controversial abuse excuse in their own defense. The case was heard by dual juries, both of which deadlocked.⁴⁴ Both brothers were convicted of first-degree murder in a retrial. In another high profile case, the former mayor of the District of Columbia, Marion Barry, stood trial on drug charges. The jury convicted on just one charge, acquitted on another, and hung on the remainder.⁴⁵ Newspapers and magazines ran articles bringing the issue of hung juries to public attention.⁴⁶

Has the rate increased from Kalven and Zeisel's heyday, where all white and all male juries predominated, in contrast to contemporary juries that are more heterogeneous? The NCSC project found that state courts in large urban areas had an average hung jury rate of 6.2%, only slightly higher than the rate reported by Kalven and Zeisel.⁴⁷ Taking into account the urban nature of the jurisdictions studied, and the likelihood that their hung jury rates are somewhat higher than those in rural or suburban areas,⁴⁸ the rates of hung juries in the 1950s and the 1990s are remarkably similar.

While the mean rate is similar, the individual rates we calculated fluctuated from court to court. For example, rates ranged from a low of .1% in Pierce County, Washington to a high of 14.8% in Los Angeles County,

⁴² Data were collected in Los Angeles from June to October 2000, in Maricopa County from November 2000 to October 2001, in Bronx County from February to August 2001, and in the District of Columbia from April to August 2001. *Id.* at 29.

⁴³ California District Attorneys Association, *Non-Unanimous Jury Verdicts: A Necessary Criminal Justice Reform* (May 1995) [hereinafter *Cal. Dist. Attys' Ass'n.*].

⁴⁴ Hazel Thorton, *Hung Jury: The Diary of a Menendez Juror* (1995).

⁴⁵ Joan Biskupic, *In Jury Rooms, Form of Civil Protest Grows*, *Washington Post*, at A1 (Feb. 8, 1999) (available at: <http://www.washingtonpost.com/wp-srv/national/jury080299.htm>).

⁴⁶ *Id.*; see also Jeffrey Rosen, *One Angry Woman*, *New Yorker* 55 (Feb. 24 & March 3, 1997).

⁴⁷ Hannaford-Agor et al., *Are Hung Juries a Problem?*, *supra* note 40, at 20.

⁴⁸ See *id.* at 24 for evidence that higher hung jury rates could be typical of higher density, more heterogeneous jurisdictions.

California.⁴⁹ By presenting only the average hung jury rate for all state court jury trials, Kalven and Zeisel missed an opportunity to point out that hung jury rates can vary across jurisdictions, short-circuiting a line of inquiry about certain causes of hung juries.⁵⁰

Kalven and Zeisel combined a small proportion of federal jury trials with a much larger quantity of state jury trials, and as a result failed to provide a distinct picture of hung juries in federal courts.⁵¹ In the NCSC analysis, federal hung jury rates were found to be quite low, averaging about 2% of all federal jury trials. The only exception to low hung jury rates was the federal district court in the D.C. Circuit, which had a higher hung jury rate. This court is unusual in that it has a relatively small and predominantly urban geographic jurisdiction. Most other federal jurisdictions combine urban with suburban and rural areas.⁵²

The NCSC data on federal trials clearly establish that a hung jury is more likely in a criminal than a civil trial. In federal criminal juries, the hung jury rates from 1980 to 1997 ranged from a low of 2.1% to a high of 3%. In contrast, the hung jury rate in federal civil trials ranged between 1% and 1.5% during the same period.⁵³

Several factors may contribute to the comparatively low rate of hung juries in civil trials. While both civil and criminal federal juries must be unanimous,⁵⁴ civil juries may consist of as few as six jurors instead of the twelve jurors required in criminal trials.⁵⁵ Research suggests that it may be easier to get unanimous agreement in smaller versus larger groups.⁵⁶ The burden of proof is also lower in civil than in criminal trials, which may

⁴⁹ Id. at 25.

⁵⁰ In an appendix, Kalven and Zeisel reported data on the number of jury trials that were begun but not completed. See Kalven & Zeisel, *supra* note 2, at 508, Appendix A, Table 142. Data for hung juries were included for three jurisdictions: North Dakota, no hung juries in 53 trials; New York City, 7% hung juries in 1003 trials; and Los Angeles, 15% hung juries in 133 trials. Id. These data from the 1950s suggest that had Kalven and Zeisel computed hung jury rates in different jurisdictions, they would have revealed fluctuating rates.

⁵¹ Id. at 37-38. Federal district courts provided 9.7% of the overall sample's cases. Id.

⁵² All federal circuits except for DC are comprised of multiple states and include urban, rural, and suburban areas. See the website for the federal courts at <http://www.uscourts.gov/links.html>.

⁵³ Hannaford-Agor et al., *Are Hung Juries a Problem?*, *supra* note 40, at 22. It bears mention that federal hung jury rates appear to be very stable over time. From 1980 to 1997, the total federal hung jury rate varied only .8%, with a low of 1.2% of jury trials in 1985 and 1987, to a 17-year high rate of 2% in 1992. Id.

⁵⁴ Fed. R. Civ. Proc. Rule 48; Fed. R. Crim. Proc. Rule 31.

⁵⁵ Id. Under the federal rule in civil cases, juries consist of no fewer than six and no more than twelve jurors. Any alternates who have not been excused serve on the jury. As a result, the typical federal civil jury exceeds six persons. Fed. R. Civ. Proc. Rule 48.

⁵⁶ See Hans, *supra* note 22; Saks, *supra* note 36.

THE HUNG JURY

promote greater consensus. Finally, the issues and evidence in civil cases may be less likely to divide jurors.

In the second phase of the NCSC research, we surveyed judges, jurors, and attorneys in 382 non-capital felony jury cases from four state courts. We assessed hung jury rates in these jurisdictions. But more significantly, to gain insight into the evidentiary, case and juror factors that were associated with hung juries, we compared cases that went to verdict with those that hung.

We found substantial variations in hung jury rates across the four jurisdictions. The two jurisdictions that were interested in participating in the study because of concerns about hung juries, Los Angeles and the District of Columbia, had higher rates of hung juries than the other two sites (Maricopa County and the Bronx). However, different ways of measuring hung juries affected the hung jury rate. Kalven and Zeisel are silent on whether their hung jury rates reflect the jury's inability to reach a verdict on all counts, but that is the most likely interpretation of their data.⁵⁷

Table 1.

Percentage of Hung Juries

	Sites				Totals
	LA	Maricopa	Bronx	DC	
Hung on all counts	11.7%	3.3%	3.1%	12.8%	7.5%
Hung on Count 1	16.2%	5.1%	3.1%	16.0%	9.6%
Hung on any count	19.5%	7.7%	3.1%	22.3%	12.8%

Note: This analysis includes both single and multiple defendant cases.

In the NCSC study, as shown in Table 1, hanging on any count produced the highest rate, hanging on the first count was somewhat lower, and hanging on all counts was the lowest rate.

Case Characteristics

The NCSC study examined certain case characteristics in hung juries compared to verdict juries. We predicted that the number of counts with which a defendant was charged would affect the likelihood of hung juries. As counts increase, so does the opportunity for disagreement, so that juries may be more likely to hang on at least one of the charges. However, more counts also mean greater opportunity for juries to agree on at least some of the counts, so that suggests that juries should be less likely to hang on all charges when there are multiple counts. That turned out to be the case. Look-

⁵⁷ Kalven & Zeisel's questionnaires provided judges with the opportunity to indicate the verdicts on multiple charges. See Kalven & Zeisel, *supra* note 2, at 527, 531, Appendix E. In their calculations of judge-jury agreement, they define a conviction as a conviction on any charge, even if judge and jury disagree on verdict for individual charges in cases involving multiple criminal charges. See *id.* at 59-60.

ing at the cases that hung *on any charge*, the greater the number of charges the more likely that the case outcome was a hung jury. On the other hand, looking at juries that hung *on all counts*, we found a different result. We found that when a jury hung on all counts, the defendant was charged with fewer counts on average. With fewer charges, there may be less room for a jury to compromise.

To explore whether jury diversity and composition are linked to hung juries, we analyzed juror characteristics and the likelihood of a hung jury outcome. Most of our analyses found no significant relationships between the representation of various demographic characteristics on a jury and the likelihood of a hung jury. The proportion of men on the jury was unrelated to the likelihood of a hung jury, as was the educational, racial, economic, and age diversity of the jury. The one factor that varied significantly was the percentage of jurors who have served previously on a jury. In hung juries, a larger proportion of the jurors had prior jury service. This finding counters previous empirical research on jury behavior.⁵⁸

Evidentiary Issues

When the jury's average rating of evidence ambiguity or closeness was high, the jury was significantly more likely to hang. In cases identified as having the lowest level of evidence ambiguity, there were no hung juries. As the jury's average rating of evidence ambiguity rose, so too did the frequency of hung juries.⁵⁹ This finding confirms Kalven and Zeisel's discovery that hung juries were more likely in cases with close as opposed to clear evidence.⁶⁰ These findings reinforce the conclusion that evidence ambiguity constitutes a key factor in producing hung juries.

It will be recalled that Kalven and Zeisel found that evidence ambiguity rather than complexity appeared to be more important in causing judge-jury disagreement and hung juries. Our results indicate that case complexity may play a role. We found that juries that hung on at least one charge rated the case as more complex and difficult for the jury to understand than verdict juries. In general, most juries did not appear to view their trials as highly complex. And most jurors confidently said that it was easy to understand the evidence, expert testimony, and judicial instructions. However, on average, jurors in hung cases were more likely to say that it was difficult for other jurors and themselves to understand the evidence, the expert witnesses, and the judge's instructions on the law than their verdict jury counterparts.

Notably, judges and attorneys did not share the juries' perception that the hung jury trials were more complex. Overall, judges, prosecutors, and defense attorneys rated the jurors positively on how well they understand the evidentiary and legal issues in the case. However, once the jury hung, judges

⁵⁸ Ronald Dillehay & Michael Nietzel, *Juror Experience and Jury Verdicts*, 9 *Law & Hum. Behav.* 179 (1985).

⁵⁹ Hannaford-Agor et al., *Are Hung Juries a Problem?*, *supra* note 40, at 47-50.

⁶⁰ Kalven & Zeisel, *supra* note 2, at 457.

and prosecutors (but not defense attorneys) expressed concern about juror comprehension of the evidence and law. It is important to note that this rating came after the jury reached a verdict or hung, so courtroom personnel might have been taking the result into account as they search for a reason for a hung jury.

It's interesting to observe the divergence between the juries' average perceptions of the trial's complexity and the judges' ratings of the same cases. In 75.5% of the cases, the judge rated the complexity of the case lower than the jury. Although the two are significantly correlated,⁶¹ if we had relied upon just the judge's assessment of evidence difficulty as Kalven and Zeisel did, we would have found no difference between verdict and hung juries. Indeed, as indicated in Table 2 below, a comparison of jury ratings of complexity to judge and attorney ratings reveals that judges and attorneys consistently underestimate the level of complexity from the jurors' perspective.⁶²

Table 2.

Comparison of Jury, Judge and Attorney Ratings of Case Complexity

	Jury	Judge	Defense	Prosecution
1st Quartile	2.8	1.5	2.0	2.0
2nd Quartile	3.6	2.5	3.0	3.0
3rd Quartile	4.5	4.0	4.0	4.0
Mean Rating	3.7	2.7	3.2	3.2

First Votes and Jury Verdicts

Kalven and Zeisel's insights about the strong relationship between first votes and jury verdicts were based on small numbers, although they have been reinforced by many mock jury studies since that time. Researchers interested in group processes have confirmed Kalven and Zeisel's basic findings about faction size and majority effects. Dennis Devine and his colleagues recently summarized this body of research findings.⁶³ They concluded that the verdict favored by the jury's majority is likely to be the final verdict of the jury 90% of the time.⁶⁴ In general, the available research (which is primarily mock jury data) confirms that strong majorities usually prevail,

⁶¹ Jurors and attorneys were asked: "How complex was this trial?" Judges were asked, "How complex was the evidence presented at trial?" and "How complex was the law?" The jury's average rating of the complexity of the trial was significantly correlated with the judge's rating of evidence complexity ($r = .41, p = .0001$) and legal complexity ($r = .48, p = .0001$). For question wording, see Hannaford-Agor et al., *Are hung juries a problem?*, supra note 40, at Appendix at 89.

⁶² To facilitate a comparison, we averaged the judge's separate ratings of evidence and law complexity and presented it as a single number in Table 2.

⁶³ Devine et al., supra note 37.

⁶⁴ *Id.* at 690.

while weaker majorities and evenly split juries have a more equivocal impact on the final verdict.⁶⁵ MacCoun and Kerr found evidence of asymmetry in the mock jury studies that they reviewed. They concluded that two-thirds majorities favoring conviction led to guilty verdicts 67% of the time, whereas two-thirds majorities favoring acquittal led to not guilty verdicts 94% of the time.⁶⁶ Devine and his colleagues extended MacCoun and Kerr's analysis, also finding asymmetry in conviction and acquittals. They asserted that the critical threshold is probably higher than two-thirds for conviction (they estimated .75 to .83) and the critical threshold for acquittal is lower than two-thirds (closer to .67 and .50).⁶⁷

Devine and his colleagues point out, though, that the relationship between first ballot votes and final verdicts and the discovery of a possible asymmetric leniency bias have been confirmed primarily through the more abundant mock jury research (where mock juries are much more likely to hang) than in real-world juries, where defendants are actually released after being acquitted.⁶⁸ Their work makes clear that evenly split real juries frequently convict,⁶⁹ as also found by Kalven and Zeisel (50% convictions in 10 evenly split juries),⁷⁰ and Sandys and Dillehay (71% convictions in 24 evenly split juries).⁷¹

In the NCSC study of hung juries, to examine the relationship between initial opinions and final verdicts, we asked jurors about their first ballot vote on the most serious charge and compared it to the jury's final verdict on that charge. In general, jurors tended to persist in their early opinions. If jurors were leaning toward conviction initially, they most often convicted. A similar pattern held for those who initially favored acquittal. However, as indicated in Figure 1 below, if jurors were closely split (e.g., 6-6, 5-7, or 7-5) or the jury had only a modest majority, the case was more likely to hang.

⁶⁵ Id. at 690-1. See also MacCoun & Kerr, *supra* note 28.

⁶⁶ Id.

⁶⁷ Devine et al., *supra* note 37, at 692.

⁶⁸ Id. at 692-93.

⁶⁹ Id. at 693.

⁷⁰ Kalven & Zeisel, *supra* note 2, at 488.

⁷¹ Marla Sandys & Ronald C. Dillehay, *First-Ballot Votes, Predeliberation Dispositions, and Final Verdicts in Jury Trials*, 19 LAW & HUM. BEHAV. 175 (1995).

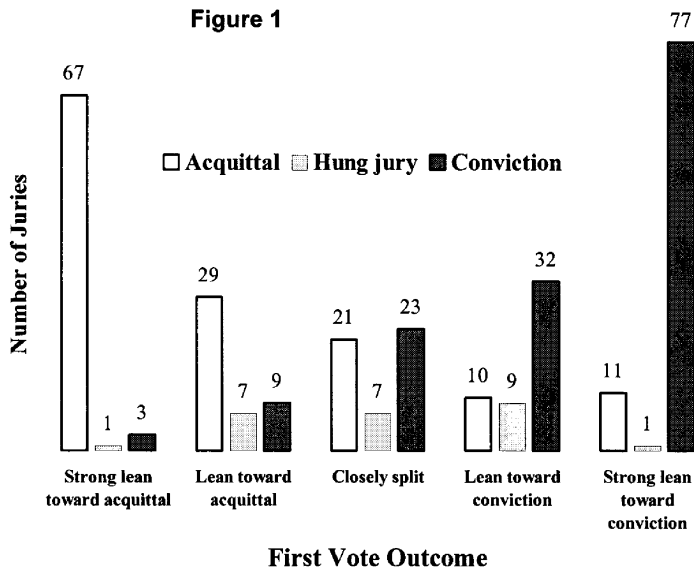


Figure 1 shows that the hung juries for which we had first-ballot information came predominantly from juries that reported even splits of opinion or only modest majorities for conviction or acquittal. There are just two hung juries in cases in which the first ballot vote showed a strong majority for conviction or acquittal.

It's interesting to observe that in these real-life juries, there is a small but not insignificant group of *Twelve Angry Men* cases, in which there was a strong majority to convict yet the jury ultimately acquitted, just as the jury did in the classic film by that name. In the 89 cases with a strong majority favoring conviction on the first vote, the jury acquitted in 11 instances, or about 12% of the time. In the 71 cases in which a strong majority favored acquittal on the first ballot, the jury ultimately convicted in 3 cases, 4% of the time. At the very least, this goes against Kalven and Zeisel's assertion that deliberation is unimportant.

Sandys and Dillehay conducted post-trial telephone interviews with jurors, asking them to report the timing and votes on their first ballots.⁷² They found that some deliberation and opportunity for group influence typically preceded the first ballot. In the NCSC study, we discovered that about 2 out of every 10 jurors reported taking a first ballot vote right at the beginning of jury deliberations, and another 4 out of 10 jurors reported taking a first ballot vote early in the deliberations. However, a substantial minority, the remaining 4 out of 10, reported that their first vote did not occur until the middle or later stages of jury deliberations. These data suggest that a jury's first ballot vote probably reflects a fair amount of social and informational influence that has already occurred during the initial stages of the group deliberation. Thus the deliberation process may be more crucial in achieving

⁷² Id.

a verdict than Kalven and Zeisel supposed when they observed that first ballot votes predicted jury verdicts.

Final votes of hung juries are also of interest. It will be remembered that Kalven and Zeisel reported that 42% of the hung juries in their sample had just one or two holdouts at the time of the final vote. Similarly, in the NCSC study, of the 42 hung jury cases in the sample with final vote information, we found that 19 of them, or 45%, included two or fewer jurors in the minority on the final vote.

Summary

The hung jury conjures up an image of failure to many members of the public, to attorneys, to judges, and to court administrators. Hung juries are undoubtedly a costly endeavor for courts and those involved with the particular case such as witnesses, attorneys and defendants, and a number of policy recommendations such as eliminating jury unanimity and reopening the case for additional evidence and arguments have been advanced in different quarters. Until recently, Kalven and Zeisel's hung jury data from 1950s American juries, derived from a small sample size, constituted the bulk of what was known about the hung jury phenomenon, making it risky as a basis for policy recommendations. Mock jury research and the NCSC study of hung juries have since expanded our knowledge about hung juries significantly.

A number of conclusions emerge from our survey of the research on hung juries.⁷³ Many of them reinforce the wisdom of Kalven and Zeisel's early intuitions about the hung jury. The closeness of the evidence, first identified as an important factor in hung juries by Kalven and Zeisel, has since been confirmed as a critical variable that creates difficulties for juries attempting to reach consensus. When judges and juries rate cases as more ambiguous, juries are more likely to hang.

A second conclusion we can substantiate is that first ballot votes are strongly linked to juries' final verdicts. In both mock jury experiments and studies with real juries reporting retrospectively on their voting, a strong majority prevails most of the time, whether it is a majority for conviction or acquittal. Hung juries are more likely with weaker majorities or more evenly split juries. However, recent research raises questions about Kalven and Zeisel's provocative assumption that the deliberative process is unimportant. In real juries, what we have learned is that first ballot votes are taken at the start of deliberations in only a minority of juries. This leaves room for group members to exchange information and exert social influence prior to the first ballot. Furthermore, there are a small number of juries in which the minority is able to overcome the majority's initial preference.

⁷³ This article emphasized factors relating to hung juries that resonated with Kalven and Zeisel's early work. However, the NCSC research identified some other issues associated with hung juries, including difficulty in group interaction and perceived fairness of the law among jurors. For a full discussion, see Hannaford-Agor et al., *Are Hung Juries a Problem?*, *supra* note 40.

Kalven and Zeisel reported a hung jury rate of 5.5%. Yet their approach to presenting a global rate, rather than differentiating between jurisdictions and federal and state courts, masked what probably was then and continues to be the existence of substantial variation across jurisdictions in the frequency of hung juries. We now know that jurisdictions differ in hung jury rates, with some regularly and substantially exceeding the 5.5% hung jury rate found by Kalven and Zeisel. Federal courts have very low hung jury rates of about 2%, while state courts in large urban areas tend to have higher rates, averaging around 6%. Some of the most popular theories about the hung jury, that increasing diversity makes it more difficult for jurors to agree, were not borne out in the NCSC study. Instead, some practices that are within the purview of the prosecution, such as bringing cases with relatively ambiguous evidence to trial, and charging multiple counts, appear to be stronger factors that increase the likelihood of a hung jury.

Policy Implications

The collected research on hung juries suggests some policy reforms for those jurisdictions characterized by relatively high hung jury rates. Kalven and Zeisel's early conclusion that juror confusion was rarely a factor may have been premature. Hung jurors saw their cases as more complex than did jurors who reached verdicts. A greater reported difficulty with the evidence in hung juries found in the NCSC study suggests at a minimum that it is worthwhile to explore ways to assist jurors with evidentiary disagreements when they arise during deliberation, rather than exhort them to accede on the basis of an *Allen* charge.⁷⁴ Some of the reforms pioneered in Arizona jury trials, such as reopening the evidence, or allowing additional argument by counsel, are promising in this regard.⁷⁵ Judges can assist juror comprehension in all trials by permitting note taking, allowing the submission of jurors' written questions to witnesses, and providing jurors with written copies of legal instructions. The NCSC data suggest that judges may not always see the evidence and law as difficult when the jury experiences it as challenging, so it would be prudent to employ these and other measures to improve comprehension in most if not all cases.

Another policy choice favored by some legal practitioners and commentators⁷⁶ is to eliminate the unanimity requirement. Altering the structure of the jury by eliminating unanimity requirements should decrease hung jury rates, as suggested by the 40-45% of hung juries that have one or two holdouts at the time of the final vote. Whether on balance it is wise is another

⁷⁴ *Allen v. U.S.*, 164 U.S. 492, 17 S. Ct. 154, 41 L. Ed. 528 (1896).

⁷⁵ Arizona Supreme Court Committee on More Effective Use of Juries, Jurors: The Power of 12 (Report of the Arizona Supreme Court Committee on More Effective Use of Juries) (1994).

⁷⁶ Cal. Dist. Attys' Ass'n, *supra* note 42. See also Richard H. Menard, Jr., *Ten Reasonable Men*, 38 AM. Crim. L. Rev. 179 (2001); Edward P. Schwartz & Warren F. Schwartz, *And So Say Some of Us . . . What to Do When Jurors Disagree*, 9 S. Cal. Interdis. L.J. 429 (2000).

matter. There is empirical evidence that the introduction of a non-unanimous verdict rule will affect the jury's deliberation process in unintended ways such as cutting off minority viewpoints before the jury has an opportunity to consider those opinions thoroughly. It also appears to affect the robustness and overall quality of the discussion of evidence.⁷⁷

And in at least some instances, the minority position becomes the final verdict of the jury. In 14 jury trials studied by the NCSC, juries reached a verdict at odds with a strong first ballot vote. In three instances, juries convicted when the first vote strongly favored acquittal, while in 11 instances, juries acquitted when the first ballot strongly favored conviction. Jurors required to reach only a majority verdict could be tempted to cut off discussion and render a decision when they have the requisite number of votes. If so, our data suggest that a majority decision rule would affect not just hung juries but would also produce a small but significant number of divergent verdicts. That is, some of the acquittals rendered by a unanimous jury would be convictions by a majority jury, and vice versa.

In conclusion, our empirical summary of research on hung juries leads us to emphasize the importance of assessing case strength, clarifying trial evidence, and strengthening jury deliberation as optimal ways to manage the treasured, paradoxical phenomenon of the hung jury.

⁷⁷ Hastie et al., *supra* note 22, at 83-98; Judging the Jury, *supra* note 22, at 171-75; Hans, *supra* note 22, at 24-27.